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No. 86-2032

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

JOHN DE TOMASO,
Petitioner,

VS.

PAN AMERICAN WORLD AIRWAYS, INC.,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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PRELIMINARY STATEMENT

This case is one of the latest in a long line of state and federal court cases involving claims for intentional infliction of emotional distress and defamation arising out of investigations and terminations of union employees subject to the RAILWAY LABOR ACT [RLA]. Such cases are preempted by the RLA. State and federal courts routinely hold they have no jurisdiction, as did the California Supreme Court in this case. The following list of cases with the nature of the claims alleged [DISTRESS = intentional infliction of emotional distress; DEFAMATION = libel and slander] will demonstrate the regularity with which actions against common carriers by

discharged union employees have been held to be pre-empted by the RLA:

CASE	DISTRESS	DEFAMATION
Beers v. Southern Pacific Transportation Co. (1983 9th Cir.) 703 F.2d 425	X	
Carson v. Southern Railway Co. (1979) 494 F.Supp. 1104, 1112		X
Chote v. Louisville & Nashville R.R. Co. (1981) 110 LRRM 2780	X	
Coleman v. Louisville & Nashville R.R. Co. (1979) 78-3192-NA-CV		X
Coleman v. Finch (1979) 78-3222-NA-CV		X
Dolphin v. Louisville & Nashville R.R. Co. (1978) 78-3308-NA-CV		X
Evans v. Missouri Pacific R.R. Co. (1985) 618 F.Supp. 930		X
Fraley v. Hayes (1982) 112 LRRM 2298		X (Theft)
Green v. Hughes Aircraft Co. (1985) 119 LRRM 3610		X (Theft)
Hasten v. Phillips Petroleum Co. (1981 10th Cir.) 640 F.2d 274		X

CASE	DISTRESS	DEFAMATION
Louisville & Nashville R.R. Co. v. Marshall (1979) 586 SW.2d 274, 101 LRRM 2164		X
Macy v. Transworld Airlines, Inc. (1974) 381 F.Supp. 142		X
Magnuson v. Burlington Northern, Inc. (1978 9th Cir.) 576 F.2d 1367	X	
Majors v. U.S. Air, Inc. (1981) 525 F.Supp. 853		X (Theft)
Miller v. United Airlines, Inc. (1985) 174 Cal.App.3d 878	X	X
Rable v. American Airlines (1986) USDC ND OK (85-C-1039-C)	X	

The Plaintiff/Petitioner in this case does not claim or contend that the opinion of the California Supreme Court being challenged conflicts with the decisions of another State Supreme Court or of a federal Court of Appeals. Nor does he claim that the California Supreme Court has decided an important question of federal law which has not been, but should be, settled by this Court. Plaintiff/Petitioner instead presents a question of fact [*i.e.* was the relationship between the parties an employer/employee relationship or a vendor/vendee rela-

tionship?], a question of evidence [*i.e.* could the California Supreme Court rely upon a collective bargaining agreement not introduced into evidence?] and a question of procedure not considered or decided by the California Supreme Court which limited its review to preemption [*i.e.* was Plaintiff/Petitioner entitled to a jury trial on his tort causes of action?].

A. THE FACT QUESTION PRESENTED

Plaintiff/Petitioner presents a question of fact when he claims this action arose out of and involves a vendee relationship rather than an employment relationship. In his FIRST and/or SECOND AMENDED COMPLAINTS, however, Plaintiff/Petitioner alleged that his employment agreement provided he would not be discharged or disciplined except for cause after an investigation reasonably conducted; that the investigation was negligently conducted; that he was wrongfully discharged; and, that as a result of said acts he was injured in his mind and body. Plaintiff/Petitioner's OPENING BRIEF in the California Court of Appeal contained this statement: "The distress experienced by Appellant resulting from his discharge was emphasized by him in a letter he authorized . . ." Employees, not vendees, have employment agreements. Employees, not vendees, are investigated by their employers. Employees, not vendees, are discharged. And employees, not vendees, file grievances and get reinstated without loss of benefits. The first [I] QUESTION PRESENTED purportedly based on a "sale relationship" rather than an "employment relationship", therefore, is miscast. It also presents no new, special or important question requiring a decision and Opinion by the United States Supreme Court.

B. THE EVIDENCE QUESTION PRESENTED

The question of evidence presented by Plaintiff/Petitioner is presented in an incomplete and misleading manner. Plaintiff/Petitioner does not disclose in his PETITION the following material facts: prior to commencement of the trial herein, Defendant/Respondent filed a TRIAL BRIEF challenging the jurisdiction of the court; attached to said TRIAL BRIEF were copies of ARTICLES 34 through 38 of the COLLECTIVE BARGAINING AGREEMENT between Plaintiff/Petitioner's union and his employer, Defendant/Respondent; ARTICLE 36 set forth the provisions relating to "DISCIPLINE AND DISCHARGE"; ARTICLE 37 set forth the provisions relating to "BOARDS OF ADJUSTMENT"; after he was discharged and prior to filing his FIRST AMENDED COMPLAINT to add causes of action for infliction of emotional distress and defamation, Plaintiff/Petitioner had pursued the remedies provided for in the COLLECTIVE BARGAINING AGREEMENT, expressly citing and relying upon ARTICLE 36 thereof both in his original GRIEVANCE FORM and in the form letter appealing the denial of his grievance to the WESTERN FIELD BOARD OF ADJUSTMENT.

Plaintiff/Petitioner's PETITION also does not disclose that after reading Defendant/Respondent's TRIAL BRIEF, the Trial Judge stated he was going to treat it as a motion for summary judgment and heard argument; following argument as to preemption and jurisdiction, the Trial Judge denied the motion for summary judgment and proceeded with the trial before a jury; the Trial Judge having ruled that Plaintiff/Petitioner's tort causes of action were not preempted by the RLA and that the court had jurisdiction to try said causes of action, there was no reason for or purpose to be served by introducing the

COLLECTIVE BARGAINING AGREEMENT into evidence during the trial. Furthermore, the pertinent provisions thereof were before the Trial Court and want of jurisdiction can be raised at any time. [*Beers v. Southern Pacific Transportation Company* (1983) 703 F.2d 425, 429].

Plaintiff/Petitioner introduced into evidence during the trial the GRIEVANCE FORM provided to him by his union for use in seeking reinstatement to his job. This GRIEVANCE FORM, signed by Plaintiff/Petitioner and by his union representative, specified "ARTICLE 36" and "any other article applicable" in support of his claim that his termination was unfair and unjust. There has never been any dispute, therefore, that ARTICLE 36 attached to Defendant/Respondent's TRIAL BRIEF was copied from the COLLECTIVE BARGAINING AGREEMENT involved and was the ARTICLE 36 cited and relied upon by Plaintiff/Petitioner in gaining reinstatement to his job without loss of any benefits.

Defendant/Respondent's TRIAL BRIEF, to which the applicable ARTICLES from the COLLECTIVE BARGAINING AGREEMENT were attached, was included in the CLERK'S TRANSCRIPT on appeal. Said ARTICLES, therefore, were before the California Supreme Court while this matter was before that Court. Furthermore, under California law judicial notice may be taken of facts that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy [CALIFORNIA EVIDENCE CODE §452(h)]. The facts relating to the ARTICLES from the COLLECTIVE BARGAINING AGREEMENT attached to Defendant/Respondent's TRIAL BRIEF not only were not reasonably subject to dispute but were in fact undisputed.

They also were capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy, to wit: the TRIAL BRIEF and/or the COLLECTIVE BARGAINING AGREEMENT itself. The second [II] QUESTION PRESENTED relating to evidence of the COLLECTIVE BARGAINING AGREEMENT, therefore, also lacks support and presents no new, special or important question requiring a decision and Opinion by the United States Supreme Court.

C. THE PROCEDURE QUESTION PRESENTED

Pursuant to RULE 29.2(b) of the CALIFORNIA RULES OF COURT, the California Supreme Court limited its review "to the issue of whether an employee's claims for intentional infliction of emotional distress and defamation are preempted by the RAILWAY LABOR ACT (45 U.S.C. § 151 *et seq.*)" [Plaintiff/Petitioner's PETITION p. A-2]. The third [III] and last QUESTION PRESENTED by Plaintiff/Petitioner's PETITION, whether preemption would deny him his right to jury trial, was neither considered nor decided by the California Supreme Court in its Opinion. That QUESTION PRESENTED not only presents an academic non-issue but an issue heretofore passed upon by other federal courts in opinions which have never been criticized or overruled.

In his PETITION, Plaintiff/Petitioner includes this quote from *Magnuson v. Burlington Northern, Inc.* (9th Cir. 1978) 576 F.2d 1367 at 1360:

> "We decline to address any constitutional issue because it was neither raised nor decided below".

Plaintiff/Petitioner does not disclose, however, that on the same page of the *Magnuson* Opinion this holding appears:

> "The Act does not provide for trial by jury, but that fact provides no basis for excluding his grievance from the scope of the Act . . ."

That the jury trial QUESTION PRESENTED in fact presents no new, special or important question of law which should be settled by the United States Supreme Court will be further demonstrated in Section III of the ARGUMENT section of this OPPOSING BRIEF.

The STATEMENT OF THE CASE set forth in Plaintiff/Petitioner's PETITION FOR WRIT OF CERTIORARI is incomplete, inaccurate and misleading, Defendant/Respondent, therefore, finds it necessary to provide this Court with a more complete, accurate and forthright STATEMENT. The SUMMARY OF MATERIAL FACTS which follows will demonstrate that this action is just one more of the many like actions filed by union employees seeking damages for intentional infliction of emotional distress and defamation incident to their investigation and termination. This SUMMARY will further demonstrate that no new, novel, special or important facts or issues are presented by this case which require a decision or an Opinion by the United States Supreme Court.

SUMMARY OF MATERIAL FACTS

A. THE CARGO OWNED BY TEXAS INSTRUMENTS AND RYAN INSTRUMENTS

On September 4, 1978, William Lasso, a cargo agent for Defendant/Respondent Pan American World Airways, Inc., hereinafter "Pan Am", inventoried approximately forty (40) undelivered shipments and placed them in a transfer bin. This transfer bin by means of a forklift was placed on the upper [third] level of a storage rack

behind and opposite two bins containing salvage. Lasso placed a sign on this transfer bin reading: "ALL TRANSFERS. DO NOT TOUCH". The inventory prepared by Lasso was captioned at the top: "TRF BIN INVENTORY 9-4-78." In the columns below, Lasso wrote in the waybill numbers, the number of cartons and the consignees. The cargo placed in this transfer bin, therefore, could be traced and delivered to the known consignees. And the items therein which were consigned to consignees in other states could not be abandoned salvage. Cargo only becomes abandoned salvage at its destination.

Among the items inventoried and placed in the transfer bin by Lasso for transfer to other carriers were:

1. Seven cartons containing 13,000 batteries having a declared value of $3,991.00 shipped from Hong Kong to Texas Instruments in Lubbock, Texas;

2. One carton containing 15 photomasks invoiced for $1,957.00 shipped from Tokyo to Texas Instruments in Houston, Texas;

3. One carton containing 69 thermometers for which $994.35 was prepaid shipped from Hong Kong to Ryan Instruments in Seattle, Washington.

B. THE SALE OF SALVAGE TO DE TOMASO

On September 9, 1984, Plaintiff/Petitioner John De Tomaso, hereinafter "De Tomaso", approached his supervisor, Donald Roark, and asked him if he could buy some salvage in the transfer bin area. De Tomaso had two bins in mind that were full of junk. These were the two bins *in front of and opposite* the Lasson transfer bin on the upper [third] level of the storage racks.

Damaged and abandoned cargo which could not be traced and delivered could be sold as salvage *after* Pan Am's undelivered cargo procedure was completed. Unless these salvage procedures were completed, however, it would be a violation of company policy for Roark to sell, or for De Tomaso to buy, undelivered cargo as salvage. De Tomaso, a cargo agent with eleven (11) years of seniority, was familiar with damaged and abandoned cargo and with Pan Am's procedures relative thereto.

Roark sold the two bins of salvage to De Tomaso for $200.00 without first inventorying it. He also failed to watch De Tomaso remove the salvage he sold from the warehouse. De Tomaso testified he understood and believed he was buying only salvage. Roark understood and believed he was selling only salvage. The Texas Instruments cargo and the Ryan Instruments cargo was not salvage. Pan Am's abondoned cargo procedures had not been completed as to that cargo.

C. THE NON-SALVAGE TEXAS INSTRUMENTS AND RYAN INSTRUMENTS CARGO REMOVED BY DE TOMASO

De Tomaso removed the salvage he bought from the Pan Am warehouse to his garage. In some unexplained manner, the 13,000 batteries consigned to Texas Instruments in Lubbock, the 15 photomasks consigned to Texas Instruments in Houston and the 69 thermometers consigned to Ryan Instruments in Seattle which cargo agent Lasso had inventoried and placed in a transfer bin got to De Tomaso's garage along with the salvage. As said items bore legible waybill numbers and were destined for other states, they were not damaged or abandoned cargo which could not be traced or delivered and were not salvage. De Tomaso, an experienced cargo agent, would know this.

De Tomaso called Texas Instruments in Lubbock and told a buyer there he was with a salvage company and that he had bought 13,000 batteries out of a dead freight area which he could sell to her for half price if she moved quickly. The buyer told De Tomaso that was strange as she had that quantity on a delinquency report that had not been received from the manufacturer. De Tomaso gave the buyer his home phone number and a number in the warehouse where she could call him after she checked into this. *De Tomaso did not tell this buyer he was a Pan Am cargo agent.*

De Tomaso also called Ryan Instruments in Seattle and told the Ryan Instruments representative he was a salvage agent and had acquired from Pan Am the 69 thermometers which he would sell to Ryan. De Tomaso was told the thermometers belonged to Ryan and "were not for sale and it was so stated on each instrument". De Tomaso's response was "we would either negotiate a price or they would be disposed of." *De Tomaso did not tell the Ryan representative he was a Pan Am cargo agent.*

D. THE RECOVERY BY THE FBI OF THE LOST TEXAS INSTRUMENTS BATTERIES

After De Tomaso called Texas Instruments, Continental Airlines, to whom the 13,000 batteries reportedly had been transferred from Pan Am for delivery to Texas Instruments in Houston, called De Tomaso and asked him where he got the batteries. De Tomaso told Continental he bought the batteries from salvage. When Continental asked De Tomaso who that was, De Tomaso said that he would have that party call Continental. There was no testimony De Tomaso told anyone at Pan Am about this call, requested anyone at Pan Am to call Continental or that any party called Continental.

The day after Continental Airlines called De Tomaso, FBI Agent O'Neill called Pan Am's Director of Security, James Startzell, and thereafter came to Pan Am to meet with Startzell and De Tomaso. When O'Neill and Startzell approached De Tomaso, De Tomaso told them he had been expecting them. O'Neill told De Tomaso he investigated thefts from interstate commerce and that he was there to clear up a shipment of batteries. O'Neill told De Tomaso he would have to retrieve the batteries if they were the missing shipment. *De Tomaso readily agreed to this and to go to his residence to recover the batteries.*

Startzell and O'Neill followed De Tomaso to his home where he let them into his garage. The garage contained numerous boxes having legible waybills numbers on them. Waybills are filed numerically by bill number. Shipments bearing legible waybill numbers can be traced by number even after the Pan Am computers are purged. De Tomaso, an experienced cargo agent, would know this. As previously noted, there were legible waybill numbers on the cartons containing the Texas Instrument batteries as confirmed by the Lasso inventory.

O'Neill verified the waybill numbers on the cartons of batteries in De Tomaso's garage with the waybill numbers of the missing shipment. O'Neill then told De Tomaso he would have to take the batteries with him. *De Tomaso did not object to this.* He did request a receipt, however, which O'Neill gave him. De Tomaso's son, who was present, assisted O'Neill in loading the batteries into his car.

E. THE PRIVILEGED STATEMENTS DURING THE INVESTIGATION.

While the batteries were being loaded into O'Neill's car, Startzell, at O'Neill's suggestion, started taking down the legible waybill numbers from other cartons as

they might clear up other missing shipments. While Startzell was doing this, De Tomaso asked him: "Do you think I'm in trouble?" Startzell's response was: "I don't know if you're in trouble, but somebody's in trouble because this Texas Instrument's shipment should not have been here." De Tomaso did not deny this testimony by Startzell. According to De Tomaso, however, Startzell said "it appeared [De Tomaso] had stolen the merchandise, that the stuff looked very suspicious; that since there were air waybills on it marked very clearly, that [De Tomaso] probably had taken the stuff".

De Tomaso's young son, Sean, apparently overheard the conversation between his father and Startzell as he asked if his father was going to be arrested. Sean testified O'Neill replied that if Pan Am found his father guilty, he would be arrested. Sean also testified Startzell accused his father of stealing. O'Neill did not hear Startzell accuse De Tomaso of theft. Startzell denied calling De Tomaso a thief or accusing him of criminal conduct.

F. DE TOMASO'S THEFT BY CONVERSION OF LOST CARGO OF KNOWN OWNERS

When De Tomaso returned to work he was asked to bring all of the cargo he had removed back to the warehouse. When De Tomaso did not return the cargo, Roark by MEMO/GRAM instructed him to return it pending further investigation. De Tomaso returned the MEMO/GRAM to Roark on which he had written: "Please contact Mr. Bob Cleaves" [his attorney herein] "... He [Cleaves] will be handling this in my behalf." De Tomaso did not return any of the cargo, not even that having legible waybill numbers which could have been traced and delivered to the true owners. De Tomaso instead ransomed the photomasks to Texas Instruments for $199.00 and the thermometers to Ryan Instruments

for $169.00. De Tomaso made a profit of $168.00, therefore, by holding the Texas Instruments photomasks and the Ryan Instruments thermometers for ransom while knowing those companies were the true owners of this lost cargo.

CALIFORNIA PENAL CODE § 485 provides that "one who finds lost property under circumstances which gave him knowledge of or means of inquiry as to the true owner, and who appropriates such property to his own use . . . without first making reasonable and just effort to find the owner and restore the property to him is guilty of theft." The Texas Instruments and Ryan Instruments cargo had been lost in transit [Texas Instruments filed a CLAIM OF LOSS with Continental Airlines]. De Tomaso found the lost cargo among the salvage he removed to his garage. This cargo bore legible air waybill numbers, could be traced and the true owners found. De Tomaso knew and called the true owners. He made no reasonable or just effort to restore the lost property to the owners. He instead appropriated the property to his own use by forcing the owners to pay ransom to get their property. De Tomaso, therefore was guilty of theft and was not defamed by privileged statements of theft, stealing or taking.

G. THE PRIVILEGED STATEMENTS DURING THE GRIEVANCE PROCEEDINGS

Pan Am and Teamsters Local 207, De Tomaso's union with whom Pan Am had the COLLECTIVE BARGAINING AGREEMENT heretofore referred to, had developed a working relationship and had established procedures. If a Pan Am employee was going to be terminated, the union would be notified. If there were meetings or proceedings, a union representative would be

permitted to attend. If this procedure was not followed, the union would have a legitimate disagreement with Pan Am.

Pursuant to the working relationship and the established procedures, Pan Am's director of cargo made a "courtesy call" to De Tomaso's union to advise that Pan Am was contemplating terminating De Tomaso for theft. Pan Am's labor relations manager also made a "courtesy call" to advise the union of the contemplated termination and the grounds therefor.

Pursuant to the working relationship and the established procedure, a meeting was held which De Tomaso attended with his union representative. During that meeting Startzell said De Tomaso was being terminated for stealing. When the union representative told him that was a very hard accusation to make and was an assumption on his part since De Tomaso had purchased the merchandise, Startzell did correct himself.

H. DE TOMASO'S PRE-DISCHARGE COMPLAINT FOR BREACH OF WARRANTY.

De Tomaso's attorney, Robert N. Cleaves, Esq. wrote to Pan Am on behalf of De Tomaso and demanded payment of $7,908.00 for breach of warranty of title to the batteries recovered by the FBI for Texas Instruments. There is no warranty of title under Section 2312(2) of the CALIFORNIA COMMERCIAL CODE, when, as here, the buyer knows the seller does not claim title or is selling only such right or title as the seller might have. De Tomaso, an experienced cargo agent, knew he was buying salvage as to which Pan Am did not claim title and that Pan Am was selling only such right thereto as it might have. Pan Am, therefore, did not pay De Tomaso's breach of warranty demand for $7,908.00. In December 1978 De Tomaso filed

a COMPLAINT FOR BREACH OF WARRANTY against Pan Am for the fair market value of the Texas Instruments batteries "which [he] believes exceeds $7,908.00" and for the fair market value of all other property purchased by him "to which [Pan Am] did not have title at the time of sale . . ." This COMPLAINT contained no tort causes of action.

I. DE TOMASO'S TERMINATION AND GRIEVANCE HEARINGS

By letter dated January 11, 1979 De Tomaso was advised that Pan Am had completed its investigation, had concluded his actions were dishonest and violated posted Employees' Rules of Conduct and that his employment was being terminated effective that date. That same day De Tomaso signed a GRIEVANCE FORM provided by his union seeking reinstatement to his job with no loss of benefits. Item 2 of the printed GRIEVANCE FORM was as follows:

> "2. Specify the Article(s) of the Agreement which supports the claim._____."

De Tomaso filled in the underlined blank provided for this information as follows:

> "#1 Article 36 #2 any other article applicable"

A hearing was held on De Tomaso's grievance, testimony was presented and the grievance was denied. De Tomaso's union representative then submitted De Tomaso's grievance to the WESTERN FIELD BOARD OF ADJUSTMENT in San Francisco. Item 2 of the form letter used for this purpose was as follows:

> "2. An attempt has been made to resolve this dispute as provided in Article 36 of the Agreement."

There can be no dispute that the ARTICLE 36 relied upon by De Tomaso was the ARTICLE 36 relied upon by Pan Am which was attached to Pan Am's TRIAL BRIEF and included in the record on appeal.

J. DE TOMASO'S POST DISCHARGE COMPLAINTS FOR EMOTIONAL DISTRESS AND DEFAMATION

After De Tomaso was terminated, his grievance was denied and his union representative submitted his grievance to the WESTERN FIELD BOARD OF ADJUSTMENT, De Tomaso filed a FIRST AMENDED COMPLAINT FOR BREACH OF WARRANTY AND DAMAGES (UCC § 2312); INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (C.C. §§ 3294, 3333); NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS (C.C. § 3333); DEFAMATION, AND DAMAGES against Pan Am. Following the sustaining of a demurrer to the THIRD CAUSE OF ACTION therein, De Tomaso filed a SECOND AMENDED COMPLAINT FOR BREACH OF WARRANTY AND DAMAGES (UCC § 2312); INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (CC §§ 3294, 3333); DEFAMATION AND DAMAGES against Pan Am. In these COMPLAINTS De Tomaso alleged that he was wrongfully fired . . . from his job and falsely accused . . . of fraud and dishonesty and abuse of company policy as the basis for his discharge" and that as a proximate result of these acts he had suffered "humiliation, mental anguish and emotional and physical distress [and] ha[d] been injured in his mind and body . . ." "The distress experienced by [De Tomaso) resulting from his discharge was emphasized by him in a letter he authorized to Pan Am . . ." [D.T. App. Op. Br. p. 11].

K. THE JURY TRIAL VERDICT AND POST TRIAL MOTIONS

The Trial Court let all three causes of action [BREACH OF WARRANTY; INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS; and DEFAMATION] go to the jury for decision. The jury returned a verdict for De Tomaso and against Pan Am for $265,000.00 general damages and $300,000.00 punitive damages. Pan Am filed a MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT and a MOTION FOR NEW TRIAL as to all issues. The Trial Court once again rejected Pan Am's argument that De Tomaso's tort causes of action were preempted by the RLA and that the Court had no jurisdiction as to them. The Trial Court conditionally granted Pan Am's motion for new trial limited to the issue of damages unless De Tomaso accepted or consented to a remittitur of $358,393.00 which would reduce the judgment from $565,000.00 down to $206,607.00. As the Trial Judge failed to state his grounds and reasons as required for his order granting a new trial to be valid, De Tomaso refused to accept or consent to the remittitur and instead appealed from the invalid order conditionally granting a new trial to Pan Am as to damages only. Pan Am cross-appealed from the Order denying its motion for judgment notwithstanding the verdict, from the Order denying its motion for a new trial as to all issues and from the $565,000.00 Judgment On Verdict.

L. THE COURT OF APPEAL AFFIRMANCE AND SUPREME COURT REVERSAL

The California Court of Appeal in Opinions filed October 7, 1985 and November 25, 1985 [after granting a rehearing and making minor changes in its original Opin-

ion] set aside the Order granting a new trial as to damages only. The Court of Appeal reinstated and affirmed the $565,000.00 Judgment On Verdict which the trial Judge had stated, and found, to be very excessive, without sufficient evidence to justify it and to have been given under passion and prejudice. Pan Am filed a PETITION FOR REVIEW in the California Supreme Court. Pan Am's PETITION FOR REVIEW was granted. New BRIEFS ON REVIEW were filed and the matter was argued and submitted to the California Supreme Court for decision.

The California Supreme Court reversed the judgment of the Court of Appeal affirming and reinstating the Trial Court's $565,00.00 Judgment On Verdict. The Supreme Court held that where, as here, an employee through a collective bargaining agreement has an alternative to litigation, and where, as here, the employee has used that alternative to regain his employment, it constitutes his only avenue of redress. The Supreme Court further held that where, as here, the statement complained of took place during the course of an investigation mandated by a collective bargaining agreement and during formal or informal disciplinary hearings, the statements would be privileged and the abuses alleged would be remediable, if at all, only through the grievance and arbitration provisions of the collective bargaining agreement. The Supreme Court directed the Court of Appeal to enter a new judgment consistent with these views. The Court of Appeal, as directed by the Supreme Court, remanded this case to the Trial Court for a new trial on the breach of warranty cause of action only. De Tomaso thereafter filed his PETITION FOR WRIT OF CERTIORARI in this Court. Pan Am presents herewith its OPPOSITION to De Tomaso's PETITION FOR WRIT OF CERTIORARI.

ARGUMENT

I

THIS IS A ROUTINE "MINOR DISPUTE" AND "OMITTED CASE" WITHIN THE RAILWAY LABOR ACT

De Tomaso contends "the purposes of the RLA are to provide for the settlement of disputes concerning rates of pay, rules or working conditions, grievances, or the interpretation or application of agreements covering rates of pay, rules or working conditions" [Pet. p. 21]. In the early case of *Elgin, Joliet and Eastern Railway Company v. Burley* (1944) 325 U.S. 711, 716, 65 S.Ct. 1282, 1290, 89 L.Ed. 1886, 1915, this Court distinguished between disputes involving the *formation of* collective bargaining agreements and disputes *independent of* a collective bargaining agreement. With respect to disputes where a collective bargaining agreement already exists, the Court held:

> (722) "... The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an *omitted case.* In the latter event the claim is founded upon *some incident of the* employment relation, or asserted one, *independent of those covered by the collective bargaining agreement, e.g., claims on account of personal injuries ...*" [Emphasis added]

In *Railway Labor Executives v. Atchison, Topeka and Santa Fe Railway Company* (1970 9th Cir.) 430 F.2d 994 the Ninth Circuit Court of Appeals cited and relied upon *Elgin, supra,* in holding that the jurisdiction of BOARDS OF ADJUSTMENT covered both "incident[s] of the employment relationship" and "omitted cases":

(996) "The jurisdiction of the Adjustment Board is *not limited* to disputes arising from provisions specifically included in a collective bargaining agreement. If the claim is founded some *incident of the employment relationship,* or an asserted one, the Board may determine the meaning and effect of the provisions of the collective agreement with references either to an included *or to an omitted case* . . ." [Emphasis added]

In *Union Pacific Railway Company v. Price* (1959) 360 U.S. 601, 79 S.Ct. 1351, 3 L.Ed.2d 1460 this Court held as follows:

(616) "Plainly the statutory scheme as revised by the 1934 amendments was designed for the effective and final decision of grievances which arise daily . . . This grist of labor relations is such that the statutory scheme cannot realistically be squared with the contention that Congress did not purpose to *foreclose litigation* in the court's over grievances submitted to and disposed of by the Board . . .

(617) *We therefore held that the respondent's submission to the Board of his grievances as to the validity of his discharge precludes him from seeking damages in the instant common law action".* [Emphasis added].

In *Gunther v. San Diego & Arizona Eastern Railway Company* (1965) 382 U.S. 257, 86 S.Ct. 368, 15 L.Ed.2d 308 this Court held:

(263) ". . . This Court time and again has emphasized and reemphasized that Congress intended *minor grievances* of railroad workers to *be decided finally* by the Railroad Adjustment Board . . ."

(265) ". . . That prior decisions of the Court had made it clear that the Adjustment Board provisions were to be considered as 'compulsory arbitration in

> this limited field' (citation) 'the complete and final means for settling minor disputes' (citation), and a 'mandatory, exclusive and comprehensive system for resolving grievance disputes' (citation)"

In *Andrews v. Louisville & Nashville Railroad Company* (1972) 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed. 95 this Court not only spelled out the compulsory character of the arbitral remedy provided by the RLA but pointed out that such remedy stemmed from the Act itself *independent of any agreement* between the parties.

> (322) "Thus, the notion that the grievance and arbitration procedures provided for *minor disputes* in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law.
>
> (323) "... the compulsory character of the administrative remedy provided by the Railway Labor Act for disputes such as that between petitioner and respondent stems not from any contractual undertaking between the parties but from the Act itself ...
>
> (325) "The term 'exhaustion of administrative remedies' in its broader sense may be an entirely appropriate description of the obligation of both the employee and carrier under the Railway Labor Act to resort to dispute settlement procedures provided by that Act ... *A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding (citation)* ..." [Emphasis added].

In an effort to avoid the foregoing decisions, De Tomaso contends that "the relationship between [him] and Pan Am was vendor/vendee, not employer/employee "[Pet. p. 22] and that he "did not contend there was an

abuse of the investigation process" [Pet. p. 24] or claim his damages flowed from his wrongful discharge." [Pet. p. 24] One has only to look at De Tomaso's COMPLAINTS to discover how inaccurate and misleading these claims in this Court are in fact. The following allegations appeared in De Tomaso's FIRST and/or SECOND AMENDED COMPLAINTS:

> 1. "... defendants so *negligently conducted an investigation* ... as to breach its obligation to conduct a *proper investigation*, and did on January 11, 1979, *discharge* plaintiff ... as the direct and proximate result of a *negligently conducted investigation.*"
>
> 2. "... defendants *wrongfully fired* plaintiff from his job and falsely accused plaintiff of fraud, dishonesty and abuse of company policy as the basis for his *discharge.*"
>
> 3. "... charges were falsely asserted by defendants against plaintiff as a 'foundation' to justify the *wrongful discharge* of plaintiff from his job ..."
>
> 4. "As a proximate result of the aforementioned acts, plaintiff suffered ... emotional and physical distress, and has been injured in his mind and body ..."

If, as De Tomaso now contends in this Court, "his damages flowed from torts that occurred months before his discharge" [Pet. p. 24], why did he allege but a single cause of action for breach of warranty in this original COMPLAINT against Pan Am? And why, if his damages did not flow from his discharge, did he wait until after he was discharged to amend his COMPLAINT to allege tort causes of action and include therein repeated allegations as to his wrongful discharge? That De Tomaso has to torture the facts in order to seek a writ of certiorari further demonstrates that this is not a case which needs

or warrants a decision and Opinion of the United States Supreme Court. This is particularly true since De Tomaso appealed the denial of his grievance to the FIELD BOARD OF ADJUSTMENT and was reinstated without loss of benefits.

II

THE RAILWAY LABOR ACT ITSELF PREEMPTS THE TORT CAUSES OF ACTION WITHOUT REGARD TO THE COLLECTIVE BARGAINING AGREEMENT, WHICH AGREEMENT WAS BEFORE THE CALIFORNIA SUPREME COURT IN PERTINENT PART AND COULD BE JUDICIALLY NOTICED IN ANY EVENT

As previously noted, in *Andrews v. Louisville & Nashville Railroad Company* (1972) 406 U.S. 302, 92 S.Ct. 1562, 32 L.Ed. 95 which, as here, involved allegations of a "wrongful discharge", this Court held that "the compulsory character of the administrative remedy provided by the Railway Labor Act for disputes such as that between petitioner and respondent stems *not from any contractual undertaking between the parties but from the Act itself . . .*" [Emphasis added]. (*Id.* p. 323) This Court also held in *Andrews* that "a party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding" (*Id.* p. 325). Thus, without regard to whether the COLLECTIVE BARGAINING AGREEMENT between Pan Am and De Tomaso's union was in evidence, De Tomaso's state court action would be barred by the RLA itself, by De Tomaso having submitted his grievance to the ADJUSTMENT BOARD and by De Tomaso having obtained the relief he sought in that proceeding.

Pan Am raised the preemption and jurisdiction issues in the Trial Court before the selection of the jury. Had the Trial Court not treated Pan Am's TRIAL BRIEF raising the preemption and jurisdiction issues as a motion for summary judgment and denied the motion, counsel for Pan Am would have introduced the COLLECTIVE BARGAINING AGREEMENT into evidence during the course of the trial. De Tomaso has never questioned or disputed the validity of the provisions from the COLLECTIVE BARGAINING AGREEMENT copied and included in the TRIAL BRIEF and in the CLERK'S TRANSCRIPT on appeal. It ill-behooves De Tomaso at this late date, therefore, to raise an evidence question in this Court. Furthermore, the evidence question presented does not present for decision any new, special or important questions requiring a decision or Opinion by the United States Supreme Court.

III

THE RAILWAY LABOR ACT PROVIDES A REASONABLE SUBSTITUTION FOR A JURY TRIAL AND DOES NOT DENY DE TOMASO ANY OF HIS CONSTITUTIONAL RIGHTS

De Tomaso claims Congress cannot deny his right to a jury trial by adopting the *Railway Labor Act.* This claim is an old one which has been laid to rest in a number of cases. In *Brotherhood of Railroad Trainmen v. Denver & Rio Grande Western Railroad Company* (1966 10th Cir.) 370 Fed. 833 the Tenth Circuit Court of Appeals rejected the right to a jury trial in an RLA case as follows:

> (836) "Finally, the railroad contends that Public Law 59-456 by making the findings of the Board conclusive and by refusing review of an order requiring the payment of money damages, is violative of the

> Seventh Amendment right to trial by jury. We can place no constitutional significance in the statutory amendment as such. The right to a jury in the district court existed before the 1966 amendments and it exists now. The significance of the amendments lies in bounding the already limited scope of judicial review so that the merits of controversy are in reality a closed question after determination by the Board. Such power in Congress is recognized by the Supreme Court as proper in the field of railway labor law in Gunther and reflects the theory that compulsory arbitration of labor disputes would be undermined if the courts had the final say on the merits of the awards. *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 596, 80 S.Ct. 1358, 4 L.Ed.2d 1424."

In *Magnuson v. Burlington Northern, Inc.* (1978 9th Cir.) 576 F.2d 1367 The Ninth Circuit Court of Appeals disposed of a right to a jury trial argument as follows:

> (1370) "Magnuson makes two subsidiary arguments in support of his primary contention that his action falls outside the purview of the R.L.A. The first is that the exhaustion doctrine should not apply to him because it would deny his right to a jury trial. The Act does not provide for trial by jury, but that fact supplies no basis for excluding his grievance from the scope of the Act . . ."

In *Essary v. Chicago & North Western Transportation Company* (1980 7th Cir.) 618 F.2d 13 the Seventh Circuit Court of Appeals held the arbitration procedures were a reasonable substitute for a jury trial and did not violate the plaintiff's constitutional rights as follows:

> (17) "Since we find that plaintiff's suit here is barred by the earlier determination of the NRAB, we

turn now to plaintiff's allegations that this result violates his constitutional rights. These allegations are totally without merit and can be disposed of briefly. As a result of the 1966 Amendments to the Act, no disparity rising to the level of a constitutional violation any longer exists between the treatment of employers and employees under the Act. See 45 U.S.C. § 158 First (p) and (q). Plaintiff has meanwhile failed to demonstrate how the Railway Labor Act procedure established by Congress for disposing of claims arising from a collective bargaining agreement differs from the judicially-created procedure for disposing of arbitration awards. Being a reasonable substitution for a jury trial, neither procedure would be deemed to violate plaintiff's Seventh Amendment rights, especially since the Act supplies ample safeguards in 45 U.S.C. § 153 First (citation)."

De Tomaso's right to a jury trial argument, therefore, has been rejected by Circuit Courts of Appeal in at least three Circuits. Furthermore, the jury trial issue was not included in the issues as to which the California Supreme Court granted review. This jury QUESTION PRESENTED, therefore, presents no new, special or important issue requiring a decision or an Opinion by The United States Supreme Court.

CONCLUSION

In this Court Plaintiff/Petitioner De Tomaso claims:

1. That "he did *not* contend there was an abuse of the investigation process" [Pet. p. 24];

2. That "his damages flowed from torts that occurred months *before* his discharge" [Pet. p. 24]; and

3. That he "sued Pan Am for torts that occurred *during* the illegal recovery of goods sold him by Pan Am" [Pet. p. 24].

In making these claims, De Tomaso overlooks these facts which he not only has not, but cannot, dispute:

1. In his *First Amended Complaint* he alleged Pan Am "so *negligently conducted an investigation* . . . as to breach its obligation to conduct a *proper investigation* . . . and did falsely accuse (him) of fraud, dishonesty and abuse of company policy as the direct and proximate result of a *negligently conducted investigation.*" (CT p. 12];

2. In his *Second Amended Complaint* he alleged Pan Am "*wrongfully fired* [him] from his job and falsely accused [him] of fraud, dishonesty and abuse of company policy as the basis for his *discharge*" [CT p. 60] and that "as a proximate result of the aforementioned acts, [he] suffered . . . humiliation, mental anguish and emotional and physical distress, and [was] injured in his mind and body . . ." [CT p. 65];

3. FBI Agent O'Neill told De Tomaso that if he [De Tomaso] had the missing batteries he [O'Neill] would have to retrieve them and De Tomaso "*readily agreed to this* and to go to his residence to recover them" [O'Neill testimony, R.T. p. 146];

4. *FBI Agent O'Neill, not Pan Am, recovered the batteries,* not only *without objection from De Tomaso* but with the assistance of his son, Sean De Tomaso [RT p. 416];

5. The statements made by Startzell during the investigation at and recovery from De Tomaso's garage, were *in response to a question asked by De Tomaso,* were *privileged,* were *not intended to cause emotional distress* and were *not* defamatory [RT pp. 386-387; 63-64]; and,

6. De Tomaso *availed himself of the grievance procedures* provided for in the COLLECTIVE BARGAINING AGREEMENT between his Union and Pan Am and gained reinstatement without loss of benefits [Pet. 25; CT 574/587].

The California Supreme Court in a thorough, well-reasoned Opinion supported by long-settled, oft-cited authorities, correctly decided De Tomaso's tort causes of action were preempted by the RAILWAY LABOR ACT. The acts complained of were inextricably interwined with the investigation and discharge procedures mandated by the COLLECTIVE BARGAINING AGREEMENT. The grievance procedures of the COLLECTIVE BARGAINING AGREEMENT were invoked by De Tomaso and he obtained the relief he sought. Furthermore, the statements constituting the alleged torts were *invited, privileged and non-defamatory.* The pending PETITION,

therefore, presents no new, special or important reasons why this Court should grant a writ of certiorari. The PETITION FOR WRIT OF CERTIORARI should be denied.

Dated: July 22, 1987

Respectfully submitted,

By: ROBERT B. AMIDON
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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On July 22, 1987, I served the within Opposition to Petition for Writ of Certiorari in re "John De Tomaso v. Pan American World Airways Inc." in the United States Supreme Court, October Term, 1987, No. 86-2032;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on July 22, 1987, at Los Angeles, California

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